has much at stake in the marriage contract, can do much by intelligent revision of its marriage and divorce laws.

Should the reader of this attractive treatise regard the legislative proposals as unnecessarily drastic, he should turn back to the introductory statement wherein it is stated: "At present, one out of five marriages in the nation is ending in divorce. If this present trend continues, by 1965 one out of two marriages contracted in the United States will be doomed to failure." Maybe the author is right.

HOWARD L. RUSSELL*

Basic Contract Law. By Lon L. Fuller. St. Paul: West Publishing Co., 1947. Pp. xxiv, 994. $7.50.

This book, which is more than a case book, is traditional in an original and constructive way. The organization of materials and the framework of thought are familiar. Mutual Assent, Consideration and Seal, Third Party Beneficiaries, Assignment, Change in Circumstances, Conditions, the Statute of Frauds—they are the familiar headings in the familiar sequence. Nevertheless there is a critical and inquiring element in the book which represents Mr. Fuller's own contribution, influenced as it may have been by proximity to such stimulating though different scholars as Mr. Williston and Mr. Gardner.

Along with the familiar outline of organization, there are two departures from precedent in the architecture of the book itself. Before starting the familiar sequence, Mr. Fuller has a chapter primarily concerned with damages, as an indication of "the general scope of the legal protection accorded contracts." This is a subject to which the author has already made a notable contribution.[1] Doubtless because it is the first chapter, and for first-year students, the chapter in the book omits some of the interesting applications of his ideas which Mr. Fuller suggests in his article. The materials and distinctions are provided, however, and there is no doubt that they will appear in class discussion of later topics, such as mistake, consideration, impossibility, and conditions.

The second innovation is practically at the end of the book. Using "conditions" in the most general sense, Mr. Fuller devotes two separate chapters to them. Chapter 7 focuses attention on problems of draftsmanship, and Chapter 8 focuses attention on problems of counseling and negotiation which may arise when a condition has not been fulfilled or when the other party has defaulted on an obligation. The result seems to be a very effective teaching instrument. A difficult and important subject which has been treated by writers and judges in different ways is dealt with twice. Each time the emphasis and organization are different; and each time a different and stimulating contribution is made to training in lawyers' skills.

Another great virtue of the book is still to be mentioned. A series of introductions, notes, questions, problem cases, and problems of draftsmanship, counselling, and negotiation runs through the entire work. Thus the teaching of skills which receives such an interesting emphasis toward the end of the book appears first on page 4 with a problem of damages; or, if this seems simply a familiar kind of problem, on page 33, with the first problem in drafting. Problems of all sorts appear in considerable numbers all through the volume.

* Director, American Public Welfare Association.

[1] See Fuller and Perdue, The Reliance Interest in Contract Damages, 46 Yale L. J. 52 and 373 (1936, 1937).

The introductions to chapters and sections and the comments on particular cases provide a wealth of stimulating material dealing with doctrinal law. Philosophy, jurisprudence, comparative law, and psychology are used to illuminate particular problems in contract law. Here is the element of disturbance, challenge, and growth within the traditional framework of ideas and working concepts. Here are the materials for Mr. Fuller's treatise, or perhaps this is the treatise itself.

It is impossible to do justice to this element in the book. Two examples may be selected which illustrate the strength of the presentation. If they illustrate also what seems to the reviewer a limitation, this may after all be the reviewer's limitation, and not the author's.

The most interesting of all the comments is one dealing with the psychology of the uncertainty-bearing function of contract. On page 666, Mr. Fuller begins a five-page note which raises fascinating problems about the psychology of businessmen and lawyers in their treatment of risk and its non-actuarial cousin, uncertainty.[2] It may well seem to the reader that this is the characteristic problem of contract. It appears in connection with mistake in all its forms, in our concern with consideration, in the treatment of so-called impossibility, in the treatment of default as an excuse, under many headings of public policy, and indeed it is doubtful whether any contract problem can be considered apart from reflection on the chance-taking element in transactions. It is this element which most nearly distinguishes contractual liability from other headings of civil liability, and which best explains the damages most characteristic of contract, what Mr. Fuller calls expectation damages.

The captious critic, therefore, always asking for more, would like to see the theme dealt with on page 666 combined at the outset with the theme of damages started on page 1. He would like, moreover, to urge that the theme has more than what we somewhat arbitrarily call a psychological aspect, and to ask that attention be directed to what we should ordinarily call its economic aspect as well. The uncertainties of life, particularly in a progressive society, create and are in turn increased by the characteristic capitalistic phenomenon of chance-taking and profit. The crazy fellows who experimented with horseless carriages, talking wires, and steamboats, and still more the crazy businessmen who financed the ideas, have been and may again be characteristic heroes of our society. They furnished goods, employment, adventure, and disturbance. As a group they may take more losses than gains. But one lure has been profits, and the counterpart of their contribution and their reward in contract law is the more or less deliberate "assumption of risk"[3] and the familiar award of expectation damages.

Avoiding any suggestion of such a generalization, perhaps too general and too grandiose, Mr. Fuller seems at times to have set too tight a rein on his imagination. The answer would doubtless be that he is staying close to the more cautious English way-feeling pragmatic method which is characteristic of the Common Law; and the answer may well be a good one.

The same strength and a somewhat different limitation appear in Mr. Fuller's treatment of consideration. In his notes in the chapter on Seal and Consideration, he fur-

[2] See Knight, Risk, Uncertainty and Profit (1940 ed.) for the classical treatment of these subjects.

[3] For a suggestion of the ethical, psychological, and political significance of agreement and its vitality in a different society, see Berman, Commercial Contracts in Soviet Law, 35 Calif. L. Rev. 191, especially at 210–11 (1947).

nishes many-sided and important insights. He deals with both the modern statutes and the Common Law, old and new. Perhaps it is imagination, resulting from conversations and the reading of other articles; but it seems to the reviewer that on the whole Mr. Fuller's skepticism about "reform" appears both in his notes and in his selections.

There are few teachers of contracts who agree with the reviewer, but he is inclined to favor much more legislative modification of contract law than has yet occurred. Pennsylvania, with the Uniform Written Obligations Act as part of its statute law and promissory estoppel as part of its case law, seems easily the first of the great commercial jurisdictions in the development of this portion of our commercial law. The New York statutory scheme, granting some defects, and the ambiguous but rather clear-cut tension that appears in the New York case law on promissory estoppel put the New York law next. Why should not the legislature and the profession in New York, and in each of the states which is behind even New York in this respect, take steps promptly to change the existing law at points where almost all law teachers and lawyers think it needs improvement? It is true, as Mr. Havighurst says,[4] that our common law of firm offers produces little reported litigation. But how many business men are told that they have no case when an offer has been revoked before acceptance? How many similar points add dollars to negotiated settlements on one side or the other? How much textbook paper and how many class hours are wasted on theological and anthropological discussion only we in the teaching profession know; though our students may at times suspect them.

Here again, however, Mr. Fuller and the Common Law may well be right. The cautious use of the characteristic theological argument from analogy, the concealed reference to policy, the recalling of how the surgeon operated rather than how the patient fared, these may after all be appropriate elements in an institution designed to deal with the rough and tumble of human affairs and still maintain the mysterious and sacred instruments of authority.

MALCOLM SHARP*

[4] For an able statement of the case against the reviewer's position, see Havighurst, Consideration, Ethics and Administration, 42 Col. L. Rev. 1 (1942).

* Professor of Law, University of Chicago.